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Case No. 83-1160

IN THE

Supreme Court of the United States

October Term, 1983

HINSON McAULIFFE, Individually; and
JAMES L. WEBB, as Solicitor General for the
County of Fulton, State of Georgia,
Petitioners,

v.

PENTHOUSE INTERNATIONAL, LTD.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent objects to numbers one through four of the Questions Presented (Pet., p. i) to the extent these questions state that the issue below and in this Court pertains to the obscenity of the movie, *Caligula*, under state law. The question litigated below was whether Petitioner McAuliffe's threatened arrests under O.C.G.A. § 16-12-80 for exhibition of *Caligula* would constitute an infringement of First and Fourteenth Amendment rights. The Petitioner's statement of Questions Presented is an attempt to focus the issues in a way which is contrary to the record in this case.

PARTIES OF THE PROCEEDING

In addition to those parties listed in the caption to the case, respondent here lists pursuant to Sup. Ct. R. 28.1, all parent companies, subsidiaries and affiliates of Penthouse International, Ltd.:

Boardwalk Properties, Inc.
Bravo International, Ltd.
Dial-A-Delight, Inc.
Evelyn Rainbird, Ltd.
Evelyn Rainbird House Parties, Inc.
F D X Patent Holding Company, N.V.
Film Follies, Inc.
Follycons, Inc.
For Your Ears Only, Ltd.
Forum International, Inc.
Forum International, Ltd.
Minaotaur Press, Ltd.
Nova Publications, Ltd.
Omni Accessories, Inc.
Omni Export Corporation
Omni Medical Services Corp.
Omni New Frontier Productions, Ltd.
Omni Productions International, Ltd.
Omni Publications International, Ltd.
P-H Construction Corp.
P-H Fine Arts, Ltd.
P.H. Realty Leasing Corp.
Pan Am Pharmaceutical Associates, Ltd.
Penthouse Atlantic Corporation
Penthouse Book Society, Ltd.
Penthouse Clubs, Ltd.
Penthouse Clubs International, Ltd.
Penthouse Clubs International Establishment

Penthouse Communications, Ltd.
Penthouse Creations, Ltd.
Penthouse Energy Technology Systems, Ltd.
Penthouse Export Corporation
Penthouse Films International, Ltd.
Penthouse Financial Services, N.V.
Penthouse International, Ltd.
Penthouse International of California, Ltd.
Penthouse Letters, Ltd.
Penthouse - Lincoln Associates, Ltd.
Penthouse Maintenance & Security Co., Ltd.
Penthouse Music, Ltd.
Penthouse Photo World, Ltd.
Penthouse Poster Press, Ltd.
Penthouse Press, Ltd.
Penthouse Products, Inc.
Penthouse Products, Ltd.
Penthouse Properties, Ltd.
Penthouse Property Development, Ltd.
Penthouse Publications, Ltd.
Penthouse Records, Ltd.
POF Subsidiary Co., Ltd.
Rotel, Inc.
Tilley Marlieb Advertising, Inc.
Tilley Marlieb Productions, Inc.
2201 Boardwalk, Inc.
U.S. Robots & Mechanical Men, Inc.
Variations Publishing International, Ltd.
Viva International, Ltd.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Penthouse International, Ltd. ("Penthouse") respectfully requests that this Court deny the petition for certiorari, seeking review of the Eleventh Circuit's judgment and opinion in this case. That opinion is reported at 717 F.2d 517.[1]

[1] Petitioners have mistakenly reproduced a draft of this opinion in their Appendix. Respondent has reproduced the published opinion in its Appendix included herein.

JURISDICTION

Respondent does not contest this Court's jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1), to the extent that petitioner attempts to seek review of the judgment of the Court of Appeals for the Eleventh Circuit, entered on October 17, 1983. However, to the extent that petitioner in substance seeks a review of the district court's written opinion, entered May 15, 1981, respondent contends the Petition presents matters beyond the jurisdictional ground of 28 U.S.C. §1254 or any other applicable law.

STATUTORY PROVISIONS INVOLVED

Most pertinent statutory provisions are set out in the Appendix to the Petition. In addition, this case involves the First and Fourteenth Amendments to the United States Constitution; 28 U.S.C. §1254(1); O.C.G.A. §24-4-5; and Local Rule 351.1 of the United States District Court, Northern District of Georgia. All pertinent portions of these authorities are reproduced in the Appendix herein.

STATEMENT OF THE CASE

Respondent sets out this Statement of the Case due to the omissions and inaccuracies in petitioner's Statement.[2]

Caligula was filmed in 1976 in Rome, Italy (T. 696). It was edited in London, and was finished for distribution in 1979 (T.696, 697). The film was imported to the United

[2] The petitioner's case statement improperly contains material which is not in the record below, *inter alia*, (1) references to reviews by movie critics Gary Arnold (Pet., p.3), Joseph Gelmis, Stanley Kauffman (Pet., p.4), and Oswyn Murray (Pet., p.5, n.8); (2) reference to the amount *Variety* magazine has estimated the movie has now grossed (Pet., p.5).

States and submitted to the United States customs officials for the purpose of a determination concerning whether the film should be seized as obscene under the provisions of 19 U.S.C. §1305 (T.681). The film was reviewed by the Department of Justice, and thereafter the Department of Customs admitted the film to the United States with permission to exhibit (T.684.)

Caligula is a film which deals with the life of the Roman Emperor Gaius Caligula, and the condition of Roman society beginning with the time shortly before the Emperor Gaius Caligula became a Caesar in 37 A.D., and ending with his assassination in 41 A.D. (Exhibit 5). The film is based in part on the account of Caligula's reign as told by Suetonius in *The Twelve Caesars* (Exhibit 1). The film utilizes lavish sets and has a cast of internationally acclaimed stars, including Peter O'Toole, Sir John Geilgud, Malcolm McDowell, Theresa Anne Savoy and Helen Mirren (Exhibit 5); (T.406, 407). By the time of trial, *Caligula* had been exhibited in numerous foreign countries (T.724) and was booked for exhibition in many others (T.725). In the United States, *Caligula* was viewed by an estimated 1,667,994 people in its first eleven months of circulation (T.721, 722), and grossed $9,256,924.00 during those first eleven months (T.725). At the time of trial, the film had been exhibited in over one hundred cities in the United States (Pet. App., p. 19).

The constitutional question was clearly framed in the district court. The complaint alleged *Caligula* was not obscene under the Georgia criminal obscenity statute as constitutionally applied, and sought a declaration that *Caligula* was not obscene under the First and Fourteenth Amendments to the United States Constitution (R.4). On April 10, 1981 the trial court conducted a pre-trial

conference and entered a comprehensive pre-trial order (R.217). In this pre-trial order, Penthouse stated the issue in the case was whether the motion picture, *Caligula*, was obscene under the Georgia obscenity statute, "as restricted by the First and Fourteenth Amendments." (R. 220). The pre-trial order also specified that Penthouse claimed it had been deprived of its constitutional rights (R.220). In this same pre-trial order, petitioner McAuliffe admitted, as discussed *infra*, that there were no questions concerning the trial court's jurisdiction (R.218).

Petitioner McAuliffe correctly notes there was much expert evidence at the trial court (Pet., pp.6-7). However, petitioner fails to acknowledge that the overwhelming effect of the evidence was to demonstrate the film had serious artistic and political value. Among the most notable experts were the following: Dr. Robert Sklar, chairman of the largest department of cinema studies in the United States at New York University (T.340) (whose definition of serious artistic value is quoted by petitioner (Pet., p.7), who testified without reservation that the film had serious artistic value; Dr. James W. Prothro, Professor of Political Science at the University of North Carolina (T.572), who testified that numerous political themes were developed in the film; Dr. Thomas Africa, Professor of Ancient, Greek and Roman History, State University of New York (T.453), who testified that the film was in large part, faithful to the description of the reign of Gaius Caligula as written by Suetonius (T.453-505). Dr. Downing C. Tait, a prominent Atlanta psychiatrist and Emory medical school faculty member persuasively testified that, applying contemporary community standards, *Caligula* does not appeal to the prurient interest (T.93-133). Based on the above testimony and his own viewing of the movie, Judge Freeman entered his judgment and opinion that *Caligula* is not obscene. The

advisory jury likewise found the film was not obscene. Contrary to the statement of petitioner that the trial court used a "reasonable doubt" standard of proof in its determination (Pet., p.8), respondent submits, as discussed *infra*, that the record is unclear in this regard. It should be emphasized that the trial court opinion is unpublished.

On April 11, 1983, the three judge panel of the Eleventh Circuit entered its decision (*Penthouse International, Ltd. v. McAuliffe*, 702 F.2d 925). In this two to one decision, the panel remanded the case to the district court for a determination of whether the district court's ruling constituted a ruling on a matter of constitutional law, or a declaratory judgment concerning matters of state criminal law. Both the panel majority (Judges Tjoflat and Henderson) and the minority (Judge Lynne) specifically accepted the district court's findings that McAuliffe had actually threatened to prosecute for the showing of *Caligula*, and that, as a result, Penthouse could not obtain an exhibitor in Fulton County (702 F.2d 927, n.5).[3]

In its suggestion for rehearing *en banc* of the panel decision, respondent Penthouse argued that the panel's holding was directly contrary to *Steffel v. Thompson*, 415 U.S. 452 (1974); and to controlling precedent, *Septum, Inc. v. Keller*, 614 F.2d 456 (5th Cir. 1980); and, *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980).[4] Respondent Penthouse argued that the panel

[3] Respondent agrees with petitioner (Pet., p.9, n.10) that the case should not be remanded for a determination of mootness. Respondent represents, however, that to its knowledge the movie *Caligula* is no longer being exhibited, at least in its uncut version, in Fulton County. Nonetheless, Penthouse cannot represent that it will never again run the original version in Fulton County, Georgia.

[4] *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) adopted Fifth Circuit authority as precedent for the new Eleventh Circuit.

majority decision in effect rewrote the substantive test for obscenity set out in *Miller v. California*, 413 U.S. 15 (1973).[5]

Penthouse argued to the Eleventh Circuit *en banc* that the panel decision should be vacated and the opinion of the district court affirmed. The *en banc* court vacated the panel decision, and affirmed the district court opinion as a matter of law because it was evenly divided on a proper disposition of the case. The court's *en banc* decision states that no opinion will be published because it would be of no precedential value (R. App., p.A-1).[6]

SUMMARY OF ARGUMENTS PRESENTED

1.

Petitioner is in essence arguing that certiorari should be granted based on a district court opinion. McAuliffe does not even attempt to argue that the *en banc* opinion of the Court of Appeals (which affirmed the district court opinion as a matter of law and in so doing did not set any

[5] The test for obscenity is: "whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. 15 at 24.

[6] Contrary to the argument attempted in the Brief Amici Curiae by Charles H. Keating, Jr., and Citizens for Decency through Law, Inc., the rendering of an evenly divided *en banc* decision of no precedential value is not alone reason for this Court to accept certiorari. *Henderson v. Fort Worth Independent School District*, 584 F.2d 115 (5th Cir. 1978) (*en banc*), *cert. denied*, 441 U.S. 906 (1979) (cited in the *en banc* decision in this case). Moreover, this Court has previously held that procedural issues concerning *en banc* hearings are matters for the courts of appeals themselves and will not be ordinarily reviewed by the Supreme Court. *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963); *Western Pacific R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247 (1953).

precedent), in and of itself constitutes a reason to grant certiorari. Petitioner has failed to present any reason contained in Sup. Ct. R. 17.1 why certiorari should be granted.

2.

Petitioner's arguments that the district court's unpublished opinion is worthy of review in this Court are without merit. Each of petitioner's "Reasons for Granting the Writ" fail. First, because the record at the trial court level simply does not present the issues raised by petitioner in a clear manner, if at all. Second, the trial court was correct on the merits. Third, the case does not lend itself for review by this Court under any theory of important federal question, because a finding of non-obscenity does not require an independent review to insure that First Amendment rights are being protected. In fact, to respondent's knowledge, this Court has never accepted certiorari review from a finding of non-obscenity in the lower courts.

3.

Petitioner argues that no declaratory judgment jurisdiction exists where application of a state obscenity criminal statute is involved. The argument fails to recognize that here, First Amendment constitutional rights of respondent were being threatened. Federal courts have exercised declaratory judgment jurisdiction in instances such as these. *Septum, supra; Penthouse*, 610 F.2d 1353, *supra*. Moreover, this Court provided for protection of First Amendment rights through this very procedure. *Steffel v. Thompson, supra*, 415 U.S. 452. Certainly, actions for declaratory judgments can and do involve factual adjudications.

4.

Next, petitioner argues that the reasonable doubt standard should not have been utilized. Even if the record were clear that this were the case, even if the reasonable doubt standard should not have been utilized, and even if the record did not support a finding of non-obscenity by a preponderance, this Court should not grant a writ to review an error of law in the trial court.

5.

Petitioner argues that the trial court's interpretation of prurient interest to mean that the material must stimulate the prurient interest of the average person, as opposed to shocking or offending him, conflicts with *Miller* and makes the *Miller* obscenity test meaningless. Even if the record clearly demonstrated that this was the interpretation used by the trial court, this interpretation does not conflict with *Miller* or other applicable decisions of this Court. Moreover, material can be stimulating in a prolonged manner, as a whole, but still be patently offensive under the "patently offensive" prong of the *Miller* test. The point is, the movie *Caligula* contains many, many segments of other than explicit sexual scenes, and the district court correctly found it did not appeal to the prurient interest.

6.

Petitioner argues that this Court should grant certiorari to flesh out the meaning of "serious value". McAuliffe believes the trial court should have considered whether the movie, *Caligula*, was a serious attempt at movie making by examining the intent of the producers, as well as by examining the actual effect of the movie on viewers. To buttress his position, McAuliffe cites to alleged errors

in the exclusion of evidence. This is clearly not an appropriate case to grant certiorari for the purpose of further developing the meaning of serious value under *Miller*. There is no court of appeals opinion directed at this point in this case. The district court decision is not published. The serious value test was developed as a way to safeguard against the vagaries of jury selection which could result in jury findings of obscenity in instances when the material had serious value. Certiorari review here would reverse the purpose of the serious value test, because it would be using certiorari review to second guess a finding of non-obscenity.

7.

Finally, petitioner complains of the taxation of costs against him, individually, at the trial court level. Even if this were error, it does not present an important federal question, and appears to be moot. Respondent has never sought taxation of trial court costs against petitioner, individually, or otherwise. It appears that by local rule, respondent cannot do so now. Respondent reserves the right to seek taxation of appellate costs, but that is not at issue here.

REASONS THE PETITION SHOULD BE DENIED

I. THE DISTRICT COURT'S EXERCISE OF JURISDICTION DOES NOT CONSTITUTE A BASIS FOR CERTIORARI JURISDICTION.

A. The Requirements Of Sup. Ct. R. 17.1 Have Not Been Met.

Petitioner does not contend that the actual Eleventh Circuit *en banc* decision falls within the grounds for certiorari set forth in either Sup. Ct. R. 17.1(a) or 17.1(c).

Petitioner[7] has failed to allege any basis for this Court's review of the Eleventh Circuit opinion pursuant to Sup. Ct. R. 17.1. The Eleventh Circuit *en banc* court was equally divided on the proper disposition of the district court decision. The court of appeals wrote no *en banc* opinion, and the district court decision, which was not published, was affirmed by operation of law. The certiorari procedure provides a way for this Court to exercise its discretionary jurisdiction to review decisions of the courts of appeal. 28 U.S.C. §1254. This Court has no jurisdiction to review judgments of the district courts by writ of certiorari. 28 U.S.C. §1254. The Eleventh Circuit *en banc* affirmance without opinion does not decide an important question of federal law. Likewise, the Eleventh Circuit decision does not decide a federal question in a way which conflicts with any applicable decision of this Court. Petitioner does not attempt to argue that the actual Eleventh Circuit *en banc* ruling calls for the exercise of this Court's power of supervision. Thus, there is no need to review the Eleventh Circuit's *en banc* decision. Petitioner's attempt to use the district court's unpublished opinion as a basis for certiorari review amounts to an attempt to obtain review by certiorari of a district court decision.

B. The District Court's Exercise Of Jurisdiction Under 28 U.S.C. §2201 Does Not Raise Any Important Question Of Federal Law, And Does Not Conflict With Applicable Decisions Of This Court.

The district court conducted a trial, and entered a

[7] Although the Petition was filed by both Mr. McAuliffe and his successor in office, James L. Webb, Mr. Webb was not involved or named in any of the proceedings below. Therefore, respondent will refer to petitioners as petitioner, in the singular, or to "McAuliffe." Penthouse knows of no order of substitution entered under Sup. Ct. R. 40.3.

judgment on May 15, 1981 pursuant to 28 U.S.C. §2201. Petitioner misleads this Court by attempting to argue that the question of subject matter jurisdiction was litigated in the district court. Contrary to what petitioner intimates (Pet., p.11, n.11) the question of jurisdiction was not contested in this case. The pre-trial order specifically provided that the parties were in agreement that jurisdiction was founded on 28 U.S.C. §§1331, 1332 and 1343(3), and that there were no questions concerning the court's jurisdiction. (R.218).

Petitioner himself counterclaimed seeking a declaratory judgment that *Caligula* was obscene under O.C.G.A. §16-12-80 (R.45-46). Thus, petitioner McAuliffe expressly stipulated jurisdiction in the pre-trial order and expressly invoked the district court's jurisdiction by asserting a counterclaim for a declaratory judgment that *Caligula* was obscene. Therefore, even if McAuliffe were correct in principle, the record below does not support a review of the matter. Now that petitioner McAuliffe has lost the trial, he should be estopped from asserting as a ground for acceptance of certiorari, that the district court should not have exercised declaratory judgment jurisdiction.

Assuming petitioner's belated and contradictory attempt to question the district court's jurisdiction can now be considered, petitioner's argument is without merit. Petitioner is unable to cite any decision of this Court in support of his argument that the district court improperly assumed jurisdiction in this case. Indeed, petitioner concedes that *Steffel v. Thompson*, 415 U.S. 452 (1974) holds that where it is contended that a genuine threat of state prosecution will infringe constitutional rights, federal declaratory relief is available. Petitioner concedes that declaratory relief is available even though the state

statute is facially constitutional and the requirements for injunctive relief are not met. Finally, petitioner concedes "that there is no question in the instant case but that respondent was the subject of a genuine threat of prosecution." (Pet., p.11). Unable to cite supporting authority for his position, and forced to concede the general availability of declaratory relief to protect First Amendment rights under *Steffel*, petitioner is relegated to attempting to distinguish *Steffel* on superficial grounds. Thus, petitioner argues that in the instant case, the issue presented to the district court was merely whether conduct satisfied the elements of a state criminal statute.

Petitioner's basic tenet, that the district court should not advise parties concerning whether proposed conduct would violate state criminal law, can be successfully applied to many crimes such as larceny, embezzlement and murder. However, the relationship between state obscenity laws and the *Miller* test for protected speech requires a different analysis when the alleged crimes involve state obscenity statutes. The question of whether certain conduct constitutes larceny, embezzlement, or most other state crimes, does not involve a determination of a constitutional right. However, obscenity and protected First Amendment speech are mutually exclusive in law. An allegation that *Caligula* is protected by the First Amendment is necessarily an allegation that *Caligula* is not obscene under O.C.G.A. §16-12-80, or any other state obscenity statute. Because the Georgia obscenity statute tracks the *Miller* test for obscenity, a trial on the question of obscenity as defined in *Miller* involves the same evidence and the same substantive decisions as a trial under O.C.G.A. §16-12-80. As Judge Lynne stated in his dissent from the vacated Eleventh Circuit panel decision:

> It would be anomalous to suggest that it is possible to adjudicate the question of whether material is obscene under the Georgia statute without resolving at the same time whether such material is protected by the First Amendment within the *Miller* definition of obscenity since out of the facts the law arises.

702 F.2d at 930. As in *Steffel*, the question in the instant case is whether a prosecution threatened under a state criminal statute abridged rights guaranteed by the First Amendment. The district court properly assumed jurisdiction of this issue. In so doing, it was following controlling precedent. *Septum, Inc. v. Keller, supra*, 614 F.2d 456; *Penthouse International, Ltd. v. McAuliffe, supra*, 610 F.2d 1353.

As a makeweight argument, petitioner also contends that even if the district court properly assumed subject matter jurisdiction in this case, the district court erred in proceeding to adjudicate facts. Petitioner fails to cite any decision by this Court to support the novel idea that a United States district court cannot adjudicate facts in the process of adjudicating rights under the declaratory judgment act. Such a holding would restrict the district courts to entering declaratory judgments only as to matters of law. Nothing in the declaratory judgment act restricts the district court's power to only those cases in which issues may be decided "as a matter of law" or as a "matter of federal constitutional law". Rather, the declaratory judgment act gives the district court the power to declare "the rights and legal relations of any interested party . . ." in a case of actual controversy. 28 U.S.C. §2201. Indeed, actions for declaratory judgment have traditionally involved adjudications of fact, e.g., *Cohen v. Public Housing Administration*, 257 F.2d 73 (5th Cir. 1958), *cert. denied*, 358 U.S. 928. Certainly a determina-

tion of obscenity under *Miller* requires factual determinations. *Smith v. United States*, 431 U.S. 291 (1977).

II. EVEN ASSUMING THE DISTRICT COURT USED THE REASONABLE DOUBT STANDARD OF PROOF, AND THAT THIS WAS ERROR, THIS IS NOT A BASIS FOR GRANTING CERTIORARI.

A. The Record Is Unclear As To Whether The District Court Utilized The Reasonable Doubt Standard.

McAuliffe argues (Pet., p.16) that the trial court employed a reasonable doubt standard of proof and that, because this was legal error, this Court should grant review by issuance of writ of certiorari. Nowhere in the district court's opinion does the district court state that it is deciding the case based on the reasonable doubt standard of proof. McAuliffe is misleading the Court in stating otherwise (Pet., p.16). The most the opinion reveals is that the advisory jury (impaneled pursuant to Fed. R. Civ. P. 39(c)) was instructed to use the reasonable doubt standard of proof and that, in the words of Judge Lynne (the dissenting judge on the panel below), because of this, it was reasonable to assume that the trial judge applied the standard. 702 F.2d at 930 (Pet., p.16, n.12). Not only is McAuliffe unable to point to a court of appeals decision for this Court to review; even the unpublished district court opinion does not crystallize the issue petitioner seeks to present. Absent a clear ruling by the trial court as to the standard of proof which it applied, there is no reason whatsoever to grant certiorari as to this matter. Moreover, the evidence supports a finding of non-obscenity even under a preponderance of the evidence standard.

B. Legal Error Is Not A Basis For Issuance Of A Writ.

Assuming *arguendo* that the trial court did indeed employ a reasonable doubt standard of proof and that the standard was incorrect as a matter of law, this Court should not grant certiorari jurisdiction to correct an alleged legal error at the trial court level. This Court is not primarily concerned with the correction of legal error in the lower courts. *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974).

Here, the claimed legal error is not even argued to rise to constitutional dimensions. Instead, petitioner argues that in declaring *Caligula* not obscene, the district court precluded the use of the Georgia civil nuisance remedy where a lesser standard of proof than reasonable doubt would have been used (Pet., p.17). But the civil nuisance statutes were not at issue.

C. The Standard Of Proof Utilized Does Not Conflict With Any Decisions Of This Court.

McAuliffe argues that the district court's use of the reasonable doubt standard in the context of a civil declaratory judgment action conflicts with *California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater*, 454 U.S. 90 (1981). In *Cooper*, this Court established that the United States Constitution does not require states to prove obscenity beyond a reasonable doubt. The nature of the relief sought below distinguishes this case from *Cooper*. Here, Penthouse sought a declaration that the movie *Caligula* did not violate the criminal obscenity statute of Georgia, and asked for injunctive relief against

prosecutions related to its exhibition. In *Cooper*, the city sought an injunction under the civil nuisance abatement statutes to prohibit the exhibition of an arguably obscene motion picture. In *Cooper*, the California civil nuisance statutes allowed proof by a preponderance of the evidence. By contrast, Georgia requires proof of criminal obscenity beyond a reasonable doubt. O.C.G.A. §24-4-5. Use of the civil standard of proof by the trial court here would have made the declaratory judgment action pointless. For example, had the district court below held that by a preponderance of the evidence the movie was obscene, Penthouse would have remained uncertain as to whether exhibition of *Caligula* could result in criminal conviction under a reasonable doubt standard. The views of Justice Brennan, as expressed in *McKinney v. Alabama*, 424 U.S. 669, 683-684 (1976), apply here in principle.

III. THE DISTRICT COURT'S INTERPRETATION OF PRURIENT INTEREST AS APPLIED IN ITS FACT FINDINGS CANNOT BE THE BASIS FOR GRANTING CERTIORARI.

McAuliffe attempts to argue that this Court should grant certiorari based on alleged erroneous instructions to an advisory jury (Pet., pp.18-19). Petitioner argues that the district court erred when it instructed the advisory jury that in order to satisfy the prurient interest prong of the *Miller* test, the material had to appeal to the prurient interest *of the average person*, rather than to the average person's prurient interest. Even if the instructions were in error, they were to an *advisory* jury. In the district court opinion itself, the court states "that to the average person applying contemporary community standards, the film *Caligula*, viewed in its entirety, does not appeal to the prurient interest in sex" (R.335; Pet. App.,

p.25). This holding by the district court is clearly in accord with the authorities on which petitioner relies (Pet., p.20), and is perfectly consistent with petitioner's semantics concerning the wording of the prurient interest test. No conflict exists between the district court's opinion and this Court's decisions. Moreover, many Supreme Court authorities state the test in the phraseology used by the district court to the advisory jury, *i.e.*, whether the material appeals to the interest of the *average person*. *Miller*, *supra*, 423 U.S. at 33; *Smith*, *supra*, 431 U.S. 291 at 304; *Pinkus v. United States*, 436 U.S. 293 at 302, 303 (1978). Penthouse submits McAuliffe's "prurient interest" argument is a matter of semantics, with no substantive difference.

McAuliffe argues (Pet., pp.19-20) that the district court erred in interpreting "prurient interest" to mean that the material had to sexually stimulate the viewer, and erred in finding that the movie did not appeal to the prurient interest because the tendency of *Caligula* was, instead, to "inhibit sexual stimulation" (Pet. App., p.25). McAuliffe argues that such an interpretation of the test is in conflict with *Mishkin v. New York*, 383 U.S. 502 (1966). *Mishkin* holds that where materials are aimed at a deviant group, they must be judged on the basis of prurient appeal to that group rather than on their appeal to the average person. *Mishkin* does not hold that materials intended for the general public which offend or sicken the average person satisfy the pruriency requirement.

Contrary to petitioner's contention, the trial court recognized that appeal to the prurient interest means a "shameful or morbid interest in nudity, sex, or excretion" and correctly noted that in *Roth v. United States*, 354 U.S. 476, 487, n.20 (1957) the Court found that to be "pruri-

ent" the material must have a "tendency to excite lustful thoughts."[8] The trial court's interpretation is in accord with that of other courts. (*United States v. 35 MM. Motion Picture Film*, 432 F.2d 705 (2d Cir. 1970).

McAuliffe argues that the district court's interpretation of the prurient interest test is in conflict with the patently offensive prong of the obscenity test. McAuliffe's argument is that if "prurient" is interpreted to mean erotic or stimulating, the subject material can not satisfy the patently offense test. The argument is without merit. First, the argument misstates the district court's interpretations of the obscenity test. As set forth above, the district court acknowledged both interpretations of the prurient interest test: (i) that the material must predominantly appeal to a shameful or morbid interest in sex, nudity or excretion; and (ii) that the material must have a tendency to excite lustful thoughts. (Pet. App., pp. 22-23). Having acknowledged these two interpretations, the district court found as fact that applying contemporary community standards, the film, taken as a whole, did not appeal to the prurient interest. Second, McAuliffe's argument assumes that material which is erotic or stimulating cannot also satisfy the patently offensive prong of the test. This inquiry is not a matter of logic; rather, it involves a matter of evidence which must be determined in a trial in light of specific evidence. Third, McAuliffe's argument misunderstands the scope of the patently offensive test. While the prurient interest test focuses on the material taken as a whole, the patently offensive test is satisfied by examining isolated parts of the material. Thus, material taken as a whole could be

[8] The district court also correctly noted that the *Roth* definition of prurience was adopted by the *Miller* court (Pet. App., p.23).

erotic, or stimulating such that it appeals to the prurient interest. The same material could have distinct portions which satisfy the patently offensive portion of the test. The above approach, followed by the district court, puts these two portions of the obscenity test in their proper perspective. Using this approach, the district court found *Caligula* did contain portions which were patently offensive; thus, this portion of the obscenity test was satisfied. However, the court found the film, *taken as a whole*, did not appeal to the prurient interest. This fact finding is not clearly erroneous. Indeed, this Court should not undertake certiorari review for the purpose of considering the sufficiency of the evidence on this point.[9]

IV. THE DISTRICT COURT'S FINDING THAT *CALIGULA* HAS SERIOUS VALUE CANNOT BE THE SUBJECT OF CERTIORARI JURISDICTION.

A. The District Court's Construction And Application Of The Serious Value Test Does Not Conflict With Applicable Decisions Of This Court And Is Not Of Great Importance.

McAuliffe argues that the district court's unpublished opinion somehow conflicts with this Court's rulings. First, petitioner argues the opinion conflicts with *Kois v. Wisconsin*, 408 U.S. 229 (1972) and *Ginzburg v. United States*, 383 U.S. 463 (1966) to the effect that a court must consider whether the material is a sham (Pet., p.23). The

[9] In order to prevail in this argument, petitioner would have to show that the court's ruling was clearly erroneous under Fed. R. Civ. P. 52. There should be no independent review by an appellate court as to prurient interest. *Smith v. United States*, *supra*, 431 U.S. at 300, 301; *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *but see*, *Penthouse International, Ltd. v. McAuliffe*, *supra*, 610 F.2d 1353 (5th Cir. 1980), which was a decision resulting from earlier litigation between these parties.

record is clear that the district court did indeed properly consider whether the movie was a "sham", and decided it was not (Pet. App., p.27).

Second, McAuliffe cites to *Splawn v. California*, 431 U.S. 595, 598-9 (1977) and to O.C.G.A. §16-12-80(d) for the proposition that the district court erred in not considering evidence of pandering (Pet., p.24). But, pandering is only present when material is disseminated to persons without their consent. *Hamling v. United States*, 418 U.S. 87 (1974). There was no evidence of this nature in the case at bar.

Third, McAuliffe attempts to argue that the district court's exclusion of certain reviews by film critics for consideration by an advisory jury conflicts with the authorities listed in pp.26-27 of the Petition. However, there is no conflict because the cases cited do not apply here. None of those cases hold that unsworn, written hearsay opinions, which are not subject to cross-examination, may be admitted over objections by opposing counsel at the trial court level as evidence on the issue of serious value.

Petitioner argues that this Court should accept certiorari because the question of what constitutes "serious value" is an important federal question which deserves review (Pet., p. 28). McAuliffe argues that a proper interpretation must consider two elements, the effort or purpose of the material, and whether or not the material communicates this factor (Pet., p.23). Because the district court did not utilize the interpretation set forth by McAuliffe, McAuliffe argues that certiorari would be proper (Pet., p.23). Even if this Court agrees that the question of what constitutes "serious value" needs to be examined in further detail, this case is not in a posture for

appropriate review of this matter. There is no court of appeals opinion on this or any other point. The unpublished district court opinion was based on ten days of trial testimony. The district court's finding of serious value is not subject to reversal under the clearly erroneous standard of Fed. R. Civ. P. 52.

Finally, the serious value prong of the *Miller* test was developed to provide a constitutional safeguard against the vagaries of jury selection. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 102 (1973) (Brennan, J., dissenting). It enables appellate courts to review findings of obscenity to be sure material which has sufficient merit is not being restricted from dissemination by findings of obscenity. Respondent's research has not disclosed any instance in which this Court has granted certiorari to review a finding or verdict of non-obscenity. Respondent submits certiorari review should not be undertaken for this purpose.

B. Certiorari Should Not Be Granted To Review Inconsequential Rulings Of An Evidentiary Nature.

Much of the petitioner's argument regarding "serious value" is based on complaints that the district court improperly excluded evidence which supported McAuliffe's interpretation of the serious value test (Pet., pp.24-27). Surely this Court should not accept certiorari to review inconsequential evidentiary rulings made at the district court level for the benefit of an advisory jury, even if they did constitute legal error. The rulings on evidentiary matters complained of by petitioner can be summarized as follows: (1) the exclusion of testimony related to the intent or purpose of the makers of the movie *Caligula* (Pet., p.24); (2) the exclusion of evidence of promotion or advertising to show commercial exploitation of erotica

(Pet., p.24); (3) the refusal by the district court to adopt findings of the advisory jury that the movie lacks serious artistic or political value (Pet., p.26); (4) the arguments that the court's fact findings as to serious value are against the weight of the evidence (Pet., pp. 26-27); (5) the exclusion of evidence relating to critical reviews of the movie *Caligula* (Pet., pp. 26-27); and (6) the failure of the district court to seriously consider the historical accuracy of the movie (Pet., p.25). Not one of these evidentiary matters is of sufficient import to require certiorari to be granted, even if they were in error. The reasons for excluding the evidence were valid, either in light of *Hamling v. United States*, *supra*, 418 U.S. 87, 127 (evidence in obscenity case excluded because it was confusing or cumulative to a jury) (R.1128-1129); or in light of applicable authorities discussed above. Moreover, the jury before whom the evidence was excluded was sitting in an advisory capacity only. In many instances the trial court had had the benefit of reviewing much of the excluded evidence in advance. (See, *e.g.* critical reviews, marked as Defendant's Exhibits 1-17.) Petitioner cannot seriously argue harmful error.

V. THE DISTRICT COURT'S IMPOSITION OF COSTS ON McAULIFFE IN HIS INDIVIDUAL CAPACITY DOES NOT CONSTITUTE A BASIS FOR GRANTING CERTIORARI.

Petitioner argues that since McAuliffe acted only in his official capacity (T. 657) and since there was arguably no evidence that he acted in bad faith, it is an important federal question whether or not to allow costs against McAuliffe in his individual capacity (Pet., pp.28-29). Even if McAuliffe acted in good faith, legal error by the trial court is not a reason for granting certiorari. Con-

trary to the words of petitioner that the decision constitutes "frightening precedent" (Pet., p.29), the precedential value of an unpublished district court opinion is at best of dubious import.

At any rate, the decision was correct and is supported by the record (R.13-34). The court has the power to tax costs individually against officials in situations such as this pursuant to Fed. R. Civ. P. 54(d). The crucial point for certiorari jurisdictional purposes is that petitioner's argument appears to be moot. Penthouse never submitted any cost bill for trial costs and apparently cannot do so now.[10]

Rule 351.1 of the Local Rules for the United States District Court, Northern District of Georgia, states that a bill of costs must be filed within thirty days after entry of judgment, or such costs will not be allowed as part of the judgment. In the case, *The Flintkote Co. v. Dravo Corp.*, No. C79-1107A (N.D. Ga. June 8, 1983) the court ruled that the word "judgment" in Local Rule 351.1 does not mean return of a mandate after appeal. That is, even where an appeal is filed, the local rule time limits for filing costs must be compiled with. In light of this case, Penthouse never submitted a bill for costs at the district court level. Penthouse filed a bill for costs on appeal pursuant to Fed. R. App. P. 39. For the above reasons, this Court should refuse to accept certiorari of matters relating to district court costs.

VI. CERTIORARI HAS NEVER BEEN GRANTED IN ANY CASE FOR THE PURPOSE OF REVIEWING A FINDING OF NON-OBSCENITY.

Although petitioner argues (Pet., p.28) that this Court

[10] It should be noted that no attorneys' fees were sought to be taxed against McAuliffe, either individually or otherwise; and, of course, none were assessed.

should independently review "serious value" and "prurient appeal," citing *Smith, supra*, Penthouse has not been able to find any case in which this Court has granted certiorari in order to review a finding of non-obscenity under the serious value prong or any other prong of the *Miller* test. For reasons discussed above, respondent submits that this Court should not undertake certiorari review of findings of non-obscenity.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON

I, James L. Paul, of Atlanta, Georgia, do hereby swear that on this 10th day of February, 1984, three copies of the Respondent's Brief in Opposition to the Petition for Writ of Certiorari were mailed, first class postage prepaid, to counsel at their addresses below, pursuant to Rule 28.3 of the Supreme Court Rules:

George M. Weaver
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I further swear that all parties required to be served have been served.

JAMES L. PAUL
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Counsel of record for Respondent

Sworn to and subscribed before me this 10th day of February, 1984.

Notary Public for the
State of Georgia at Large

My Commission Expires: _____.

APPENDIX

PENTHOUSE INTERNATIONAL, LTD.,
Plaintiff-Appellee,

v.

Hinson McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia, Defendant-Appellant.

No. 81-7426.

United States Court of Appeals,
Eleventh Circuit.

Oct. 17, 1983.

George Weaver, Atlanta, Ga., for defendant-appellant.

Grutman, Schafrann & Miller, Norman Roy Grutman, New York City, Gambrell & Mobley, James L. Paul, Atlanta, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Georgia; Richard C. Freeman, Judge.

Before GODBOLD, Chief Judge, and RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

The court voted to consider this case en banc, which resulted in the panel opinion being vacated, 702 F.2d 925. The judges of the en banc court, having heard oral argument and considered the case, are equally divided on the proper disposition. The judgment of the district court is therefore AFFIRMED by operation of law, and this decision by the court of appeals has no precedential value. *Henderson v. Fort Worth Independent School District*, 584 F.2d 115 (5th Cir.1978) (en banc), *cert. denied*, 441 U.S. 906, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979).

AFFIRMED BY OPERATION OF LAW.

CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 28:

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Official Code of Georgia Annotated, Title 24:

24-4-5. Reasonable doubt in criminal cases.

Whether dependent upon direct or circumstantial evidence, the true question in criminal cases is not whether it

is possible that the conclusion at which the evidence points may be false, but whether there is sufficient evidence to satisfy the mind and conscience beyond a reasonable doubt. (Penal Code 1895, § 987; Penal Code 1910, § 1013; Code 1933, § 38-110.)

LOCAL RULES OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA

BILL OF COSTS TO BE FILED BY PREVAILING PARTY

351.1 Time Limit. A bill of costs must be filed by the prevailing party within 30 days after the entry of judgment or such costs will not be allowed to be taxed as a part of the judgment.